

The EU Declares the Illegality of the Prohibition on Selling at a Loss in Spain

Judgment of the Court of Justice of the European Union (Fifth Chamber) of 19 October 2017

This ruling is the result of the request by Contentious-Administrative Court No 4 of Murcia, Spain for a referral to the court for a preliminary ruling with regard to the interpretation of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market (the Directive).

Specifically, the preliminary ruling was requested within the scope of proceedings between Europamur Alimentación, S.A. and the *Dirección General de Comercio y Protección del Consumidor de la Región de Murcia* (Directorate General for Commerce and Consumer Protection of the Region of Murcia, Spain) concerning the legality of an administrative penalty imposed on Europamur for infringement of the prohibition on selling at a loss laid down by Spanish legislation on retail commerce. Within this context, the Court of Justice of the European Union (CJEU) pronounced in its judgment of 19 October 2017 on the general prohibition on selling at a loss, as well as the exceptions to this, contained in certain Spanish laws, specifically in Article 14 of Spanish Act 7/1996 of 15 January, regulating retail commerce and Article 17 of Act 3/1991 of 10 January on unfair competition, and stated that this legislation is contrary to the provisions of the Directive.

Accordingly, the court held that the Directive served to fully harmonise the rules relating to unfair business-to-consumer commercial practices, providing the full list of practices that may be prohibited in general without the need for a case-by-case assessment of each one. In this manner and starting from this premise, the CJEU continued by indicating that selling at a loss is not on that list as one of the practices that may be prohibited by Member States, whereby it cannot be deemed an unfair practice for the purpose of European legislation and, therefore, a Member State cannot prohibit it in general in its internal legislation.

Thus, in analysing the internal legislation under dispute, we see that Article 17.1 Spanish Act 3/1991 on Unfair Competition ("LCD"), expressly provides that prices may be freely set and, therefore, a sale at below cost or purchase price may only be deemed unfair in the following three cases: i) when such sale at a loss misleads consumers about the pricing of other goods or services in the same establishment, ii) where it has the effect of discrediting the image of another product or establishment, and iii) where it is part of a strategy aimed at removing a competitor from the market.

On the other hand, Article 14 of the Spanish Retail Act ("LOCM") prohibits those sales made at a price lower than the purchase price appearing on the invoice or, where appropriate, sales made at a price lower than the replacement price. Notwithstanding the provisions of this article, there are a couple of exceptions to the general principle of selling at a loss, namely: (i) the objective of the person doing so is to match the prices of one or more competitors with the ability to materially affect that person's sales or (ii) the sale involves perishable goods which will shortly be unfit for use. These exceptions to the above general prohibition do not abide by the criteria envisaged in the Directive and, to this regard, the CJEU holds that "**Member States may therefore not adopt stricter measures than those provided for in the Directive**, not even to achieve a higher level of consumer protection".

In any event, Article 14.1 LOCM itself refers to the contents of Article 17 LCD by providing, in paragraph 2, that "the provisions of the Act on Unfair Competition shall, in any event, be respected". This referral entails the recognition of the prevalence of the latter legislative provision over the general prohibition of the LOCM.

Therefore, the judgment stipulates that "**the Unfair Commercial Practices Directive must be interpreted as precluding a national provision that lays down a general prohibition of offering for sale or selling goods at a loss, without it being necessary to determine**, having regard to the facts of each particular case, **whether the commercial transaction at issue is «unfair»** in the light of the criteria set out in Articles 5 to 9 of that Directive and without conferring a discretion in that regard on the courts having jurisdiction, providing that the provisions pursues objectives relating to consumer protection".

The CJEU holds that the assumption that selling at a loss is a practice restricting competition may be deemed an unfair action with markets and consumers is not correct, and indicates that the court itself should make a case-by-case assessment and decide whether the practice effectively performed by the merchant restricts competition.

The recognition by the CJEU of the illegality of the prohibition on selling at a loss and, therefore, the recognition of its legality means that, as of this moment, there is a reversal of the burden of proof. In other words, until now, because selling at a loss was prohibited and, therefore, fined, it was the fined party who had to prove that its practice was not unfair. Now, following the judgment of the CJEU, the legality of selling at a loss is assumed, whereby it is the obligation of the claimant and the court itself to prove its illegality.

Based of the foregoing, there are two main conclusions:

- **The general prohibition on selling at a loss contained in Article14 LOCM is contrary to European Union Law**, as well as any exceptions to this, because it entails a **transgression of the provisions of the Directive**.
- As a result of this judgment of the CJEU, a need occurs in Spain to **reverse the burden of proof in cases of litigation regarding selling at a loss, because as of this time the unfairness of this practice is no longer assumed**, whereby making it the obligation of the claimant and the court itself to prove its illegality.

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